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No. 363

# In the Supreme Court of the United States

October Term 1947.

MARTHA PRYOR, OSAGE ALLOTTEE NO. 39, *Petitioner*,

vs.

SUSIE PRYOR CRAFT, ALFRED ANTWINE PRYOR, MARY MARTHA PRYOR, IRENE MARCELLE PRYOR, MINNIE OLIVIA McCLURE PRYOR, AND JULIA ADDIE PRYOR, *Respondents*.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

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# INDEX.

(*Italics in this brief are ours.*)

Table of Cases.

TEXT BOOKS.



STATUTES.

*In the*

**SUPREME COURT OF THE UNITED STATES.**

***October Term 1947.***

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**No. .....**

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**MARTHA PRYOR, OSAGE ALLOTTEE NO. 99, *Petitioner,***

***vs.***

**SUSIE PRYOR CRAFT, ALFRED ANTWINE PRYOR, MARY MARTHA PRYOR, IRENE MARCELLE PRYOR, MINNIE OLIVIA McCLURE PRYOR, AND JULIA ADDIE PRYOR, *Respondents.***

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

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## I.

### Rule of the Court.

Section 5 of Rule 38 of the Rules adopted February 13, 1939:

> "A review on a writ of certiorari is not a matter of right, but of sound judicial discretion, *and will be granted only where there are special and important reasons therefor.*"

There is no special or important reason therefor in this case.

## II.

### Facts.

There is no dispute about the facts. They were stipulated.

Antwine Pryor, a full-blood Allotted Osage Indian, died possessed of considerable property. He left a widow, Martha Pryor, the petitioner, who was allotted in her own right, and four children, Susie Pryor Craft, a daughter by a former marriage, Alfred Pryor, Elmer Pryor and Woodrow Pryor. The last three children were children of Martha Pryor, the petitioner, and were unallotted, having been born after the rolls were closed.

Antwine's estate was distributed to his widow and children in accordance with the Oklahoma law of succession. Then Woodrow died, when still a minor and not having been married, possessed only of the property which had come to him from his father.

Shortly after Antwine's death the lands which he had owned were partitioned among his heirs and Woodrow received 320 acres through the partition proceeding. In order to equalize the value of the lands partitioned among the heirs Woodrow paid for the use and benefit of the other heirs the sum of $1101.38.

This payment was made by the Osage Indian Agency from Woodrow's share of funds which he had inherited from his father, Antwine. (Rec., p. 37)

It should be kept in mind that no tribal lands, moneys, or mineral interests were allotted, segregated, or set apart to Woodrow Pryor as he was born after the Osage rolls were closed.

The only property here involved is that inherited, or ancestral, property which came to Woodrow from the estate of his father, Antwine Pryor.

## III.

### The Major Question.

The major question is whether the estate inherited by Woodrow from his father, Antwine, descended upon Woodrow's death to his mother, Martha, or to his brothers and sister.

## IV.

### The Subordinate Question.

The subordinate question is whether the partitioning of the lands by the heirs of Antwine caused Woodrow to take the land by purchase rather than by inheritance, that is, did the partition proceeding destroy the ancestral character of the property?

## V.

### Statement Concerning the Major Question.

This case does not involve a conflict between a federal and a state statute but only an interpretation of a federal statute, which is in meaning identical with the state inheritance statute as far as the question here raised is concerned.

By the Act of Congress of June 28, 1906 (34 Stat. L. 539), Congress made the law of succession of Oklahoma applicable to the Osage Indians. That act provided for the division of funds and for the allotment in severalty of the lands in the Osage Nation which had theretofore been owned by the Osage tribe as a whole.

Then Section 6 of that act provides as follows:

> "That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or the state in which said reservation may be hereinafter incorporated except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys,

and mineral interests must go *to the mother and father equally.*"

At that time the law of succession of Oklahoma Territory provided that if a decedent "leave no issue, nor husband nor wife, the estate must go to the *father.*"

Section 6261 of the old 1893 Territorial Statutes, which was in force at that time, provided as follows:

> "*Second.* If the decedent leave no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if he leave a mother also, she takes an equal share with the brothers and sisters. If decedent leave no issue, nor husband nor wife, the estate must go to the father."

In 1909 the State of Oklahoma amended that section of the Succession Code to provide that in that situation "the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares."

The statute as amended in 1909 is still in force in Oklahoma and reads as follows (sub-division 2, Section 213, Title 84, Oklahoma Statutes 1941):

> "*Second.* If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or, if he leave both father and mother, to them in equal shares; but if there be no father or mother, then said remaining one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares: Provided, that in all cases where the property is ac-

quired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate shall go to the survivor, at whose death, if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation."

(See the Appendix for complete quotation of Section 213, Title 84, Okla. Stats. 1941.)

The purpose of the exception in the Act of Congress is clearly seen, but as the 1909 amendment to subdivision 2 of the Succession Code of Oklahoma conformed the state law to the exception in the Act of Congress there is no longer any distinction between them.

Subdivision 7 of the Oklahoma Succession Code was enacted in 1890. It was in force in 1906 when the Osage Allotment Act was passed and is still in force unchanged from the time of its enactment, and is as follows:

"*Seventh.* If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation." (Subd. 7, Sec. 213, Title 84, O. S. 1941.)

The statute came from Dakota, and to Dakota from California. It had been interpreted by the California courts long prior to the passage of the Osage Allotment Act in 1906.

## VI.

### Statement Concerning the Subordinate Question.

The subordinate question does not even involve a Federal question and does not involve any statute but is merely a question of interpretation of local law.

The Supreme Court of Oklahoma has interpreted that law in accordance with the very great weight of authority.

## VII.

### Summary of Argument on the Major Question.

1. Under the Osage Allotment Act of 1906, all members of the tribe, including infant children born up to July 1, 1907, were to be allotted. The infant children included those of members of the tribe who had "white husbands."

Congress did not want the "white husbands" to inherit from deceased children the tribal funds being segregated to the children, and lands being allotted to the children, to the exclusion of the Indian mother. The intention was to change subdivision 2 of the inheritance code of the Oklahoma Territory so that the parents would inherit equally from the children.

2. Subdivision 2 of the Oklahoma Succession Code, since it was amended in 1909, has a meaning identical with that of Section 6 of the Osage Allotment Act. Therefore, if subdivision 7 of the succession code cannot apply to the Osages because of the provision of Section 6 of the Allotment Act, it cannot apply to any person in Oklahoma on account of the provisions of subdivision 2 of the succession code. Then, after having been invariably followed by the courts of Oklahoma for over 55 years subdivision 7 has become a dead letter by judicial construction.

3. It could not have been the intention of Congress by the exception in Section 6 of the Allotment Act to except to subdivision 7 of the Oklahoma Succession Code for the decedent referred to in the exception in Section 6 is the

child and the decedent referred to in subdivision 7 is the parent.

4. It could not have been the intention of Congress by the exception in Section 6 to except to subdivision 7 for Section 6 provides that the estate must go to the parents "equally." Subdivision 7 operates only on the estate of one of the parents who has died.

5. There is no precedent supporting petitioner's position.

6. Petitioner's petition is not supported by reason or logic.

7. The authorities cited by petitioner are not in point.

## VIII.

**Congress knew that the estate inherited by a child from a parent did not pass under subdivision 2 of the succession code.**

When Congress adopted Section 6 it was well known that the estate of a child inherited from a parent was not disposed of by the succession statute as a part of the estate of the child but was disposed of as the estate of the parent and Congress was unquestionably satisfied with that provision of the law.

The Oklahoma law of succession, which Congress adopted, did not permit that portion of the parent's estate going to a child, who died under age and not having been married, to be disposed of as the child's estate. By the Oklahoma law it never came to the child so as to be operated upon by the law of succession as the child's estate, but on the death of such child the descent of the estate from the parent was recast as a part of the parent's estate and was to go as it would have gone had the child pre-deceased the parent.

The estate never came into position to be governed by the exception in Section 6 of the Allotment Act or by subdivision 2 of the Succession Code of Oklahoma.

## IX.

**Congress intended only to provide that the mother should inherit equally with the father the property which the child had in its own right.**

The intention of Congress is clear and definite to adopt all of the Oklahoma law except that provision which limited the descent of property to the father only.

It has already been pointed out that in 1906 the Oklahoma Territorial law of succession cast the descent of property from a person who died without issue or husband and wife to the father only.

It cannot be doubted but that it was that particular provision of the Oklahoma law at which Congress was striking for Congress said the estate must go to the father and mother equally. The mischief which Congress sought to remedy was the specific provision which allowed the father to inherit to the exclusion of the mother.

Section 1 of the Osage Allotment Act is in part as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, *white husbands,* is hereby declared to be the roll of said tribe and to constitute the legal membership thereof: * * *"

Then follows the provision as to just how the roll is to be made up and for the allotment of the lands and division of the funds and mineral interests.

Congress thereby displayed its knowledge that a good number of Osage women were married to white men and Congress thereby demonstrated the reason for the provision that the father alone should not inherit when conditions arose under the Oklahoma law whereby the parent was permitted to inherit.

Congress in fact, except for the change made necessary by including the mother, used the exact language that was used in subdivision 2 of the succession code. Note the language used in subdivision 2: "* * * *if the decedent leave no issue, nor husband nor wife, the estate must go to the father.*"

Section 6: "* * * *Where the decedent leaves no issue, nor husband nor wife,* in which case said lands, moneys, and mineral interest *must go to the mother and father equally.*"

Notice too that Congress referred to "*said* lands, moneys and mineral interests," showing that Congress was conscious of the fact that each member of the tribe, man, woman and child was being allotted land and awarded money and mineral interests. It was that property of which Congress was thinking, and not some share of a parent's estate, which some child would hold during minority and while unmarried, to be otherwise disposed of as a part of the parent's estate should the minor not reach majority or marry.

To be sure the minor would have the absolute right to use that estate during his minority within the bounds of statutory protections that are thrown around minors, but if he died while a minor and not having been married the share of the parent's estate which he held must descend as a part of the parent's estate under subdivision 7, and the Congress made no attempt to alter or change that provision.

## X.

**If subdivision 7 conflicts with Section 6 of the Allotment Act, it also conflicts with subdivision 2 of the succession code.**

It was unquestionably within the knowledge of Congress when the Allotment Act was passed that subdivision 7 was being applied in Oklahoma Territory to any estate which had passed from a parent to a surviving spouse and children, when the death of a child brought the subdivision into operation. It had been so applied since 1890.

Subdivision 2 of the succession code was then and still is as specific as to how an estate should descend when the deceased died leaving no issue, nor husband nor wife, as is Section 6 of the Allotment Act, yet the courts of Oklahoma have without exception held that subdivision 7 instead of subdivision 2 operates when the estate involved is an estate inherited from a parent by a minor who dies not having been married.

Some of the decisions on that point are:

*Moroney, et al.*, v. *Tannehill, et al.*, 90 Okl. 224, 215 Pac. 938;

*Johnson* v. *Grisso, et al.*, 129 Okl. 38, 262 Pac. 678;

*Follansbee* v. *Owens, et al.*, 133 Okl. 217, 271 Pac. 1023;

*He-ah-to-me* v. *Hudson*, 121 Okl. 173, 249 Pac. 138;

*Sweigel* v. *Lewis*, 139 Okl. 171, 281 Pac. 787;

*Cooper* v. *Spiro State Bank*, 137 Okl. 265, 278 Pac. 648;

*Crouthamel* v. *Welch, et al.*, 53 Okl. 288, 156 Pac. 302.

There is no more reason to say that Section 6 of the Act of Congress makes subdivision 7 of the succession code inoperative than there is to say that subdivision 2 of the succession code makes subdivision 7 inoperative.

The following is from the opinion in *Cooper* v. *Spiro State Bank*, 137 Okl. 265, 278 Pac. 648:

> "(p. 650) Subdivision 7 clearly applies only in cases where a parent has died leaving several children or one child and the issue of one or more children, and, if any such surviving child dies under age and not having been married, the estate inherited by it from its deceased parent goes to the other children of said deceased parent and to the issue of any such other children who are dead. This statute is simple, plain, and unambiguous, and provides for the descent and distribution of property acquired in the manner therein set forth, and no other. * * *
>
> "In order for subdivision 7 to become operative, there must first be a death of one leaving children or child and issue of a deceased child or children, and of necessity therefore refers to the death of a parent. With that condition as its premise, it then provides that if any such surviving child dies under age and not having been married, and therefore without issue, all the estate that came to the deceased child by inheritance from said decedent, meaning, of course, the estate of which said child became seized and possessed upon the death of its parent, descended in equal shares to the other children of the same parent and to the issue of any such other children who are dead, by right of representation."

If petitioner is correct in her theory, under our present Oklahoma law, it will be necessary for the courts, not only in an Osage Indian estate, but in a white person's estate, to say that there is no field for operation of subdivision 7 where a minor child died, not having been married regardless of whether the estate of such child was a fee simple estate vested in it in its own right, or an ancestral estate which such child would become vested with upon its arrival at majority or entering into marriage.

It is not proper for the court to look at Section 6 of the Allotment Act alone and properly consider the Oklahoma law which Section 6 adopts. It is necessary to consider all of the provisions of the Oklahoma law of succession.

Keeping in mind the language of the exception in the Osage Allotment Act, it is well known and very apparent, especially to one who knows the history thereof and the reasons therefor, that the exception was intended by Congress to, and does, apply to the second paragraph of the statute, *supra*. It is a cardinal rule of construction, to which all rules are subordinate, that the court shall give effect to the legislative intention and purpose as expressed in the statute. In the construction of the statute the paramount rule is to give effect to the intention of the law-maker. The intention of the law-maker is to be ascertained primarily from the language used in the statute or act.

The following is from 59 C. J. 957-958:

> "Where, however, the language is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning. If the intention of the legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law."

And from 59 C. J., pp. 966, 967, 968:

> "Effect will be given the real intention even though contrary to the letter of the law. The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity or injustice, or would lead to contradictions, or would defeat the plain purpose of the act."

It is very evident that it was not the purpose of Congress to annul subdivision 7 of the law of descent by the exception contained in Section 6 of the Allotment Act, no more than it was the purpose of the Oklahoma Legislature to annul subdivision 7 by subdivision 2.

## XI.

**Both Section 6 of the Allotment Act and subdivision 2 of the succession code deal with an entirely different estate from that dealt with by subdivision 7.**

A mere cursory examination of the language used in Section 6 and in subdivision 2 is sufficient to disclose that the "decedent" referred to in those sections is an entirely different person from the "decedent" referred to in subdivision 7. In Section 6 and in subdivision 2 the decedent is the child of a person who died and had a vested estate in his own right. In subdivision 7 the decedent is the parent and it is the parent's estate which is affected by the legislation, and which is disposed of by the provisions of the subdivision as a part of the parent's estate. Unquestionably that method of disposing of the parent's estate, upon the death of a child, under age and not having been married, was known to and approved by Congress when the Allotment Act was passed. There could have been no reason why Congress would have chosen to change the law so as to further prefer the widow over the child, when Congress had knowledge that the widow was generously provided for by other provisions of the law of succession.

## XII.

**By Its Language Section 6 Could Not Operate on an Estate Governed by Subdivision 7.**

It is very obvious that it could not have been possible for Congress to have intended to abrogate subdivision 7 by the provisions of Section 6 of the Allotment Act for subdivision 7 can operate only when one of the parents has died and it then operates on the estate of the parent.

Section 6 says that when one dies without a spouse or issue the estate must go to the parents equally. Subdivision 7 can operate only when one of the parents has died.

Certainly Congress would have used different language

if there had been any intention to change or modify subdivision 7.

## XIII.

**There Is No Precedent Supporting Petitioner's Position.**

Even the Interior Department, except for a little early clerical floundering, has placed upon the Allotment Act and upon the Oklahoma law the same interpretation which the Oklahoma courts have universally followed, and, except for a few mistakes made by lawyers who failed to investigate the source from which the estate came, the courts of Osage County have universally applied the law as interpreted by the Oklahoma Supreme Court.

The record in the case at bar shows that there was a previous determination of heirs by the County Court, which was later vacated. The facts are that at the time of the previous determination of heirs no investigation was made as to the source from which the estate came and the petitioner was determined to be the sole heir. The Interior Department at Washington, when that record reached there, and the facts were discovered, refused to disburse under the decree, but sent it back to the Tribal Attorney at Pawhuska for correction; and the County Court, upon discovering the source from which the estate came, promptly vacated the former decree and made a correct determination of course over the opposition of the petitioner.

Before the County Court was given exclusive jurisdiction to determine heirs of Osage Indians by the Act of Congress of April 18, 1912, (37 St. L. 86-88), the Secretary of the Interior had determined the heirs in a few Osage estates. Sometimes he followed subdivision 2 and sometimes subdivision 7.

In 1928 someone in the Indian Office raised a question as to the correctness of the Oklahoma courts in determining the heirs of the Osages in accordance with the provisions of subdivision 7 where subdivision 7 was applicable and asked the Solicitor for the Interior Department for an opinion as

to the correctness of the action of the Oklahoma courts. That opinion appears in the record beginning on page 45. It begins and concludes as follows (see the appendix for complete copy of the Solicitor's opinion):

"United States Department of the Interior
Office of the Solicitor.

Washington, June 19, 1928. M-24293.

The Honorable, The Secretary of the Interior.

"Dear Mr. Secretary: At the suggestion of the Commissioner of Indian Affairs you have requested my opinion on a question arising in connection with the determination of the heirs of Frances Pryor (An-to-oppy) deceased Osage Allottee No. 570, the nature or extent of which question will more readily appear after a brief review of some of the salient facts at hand.

"The tribal lands of the Osage Indians were allotted in severalty pro rata, among the enrolled member of that tribe pursuant to the Act of June 28, 1906, (34 Stat. 539) as a result of which each of the 2229 enrolled members received in allotment approximately 660 acres of land. Under the terms of that act the underlying oil, gas, and other mineral deposits did not pass to the individual allottees but were reserved for the benefit of the tribe at large until April 8, 1931, subject to lease in the meantime by the tribal authorities under rules and regulations prescribed by the Secretary of the Interior. This communal period of ownership of the underlying mineral deposits has since been extended to April 7, 1946, by the Act of March 3, 1921 (41 Stat. 1249). Both of the statutes mentioned direct that the net proceeds (royalties, etc.) derived from these oil, gas and other mineral deposits shall be distributed quarterly to the enrolled members of this tribe. Hence, each member receives exactly the same share of such royalties regardless of whether there had been any mineral development on the lands allotted to him or not. Owing to the large oil and gas de-

posits in the Osage country, this right to participate in the royalties derived therefrom, commonly known as 'an Osage head right,' has become a very valuable property right. Up to a year or so ago when the price of oil dropped considerably the income flowing to each enrolled member of the Osage tribe from this source alone ranged around $10,000 per year.

"As to the descent of such property, Section 6 of the Act of June 28, 1906, *supra,* provides: * * *

"This brings forward for immediate consideration the difference in devolution of estates as called for by Section 6 of the Osage Allotment Act of June 28, 1906, and the seventh canon of the State Code, both *supra,* it being again recalled that under the former if the decedent, adult or minor, leaves no issue nor husband nor wife, his Osage property must be divided equally between his mother and his father, while under the latter, if a minor, all of the estate that came to such minor by inheritance from either parent descends in equal shares to the surviving children of the same parent (brothers and sisters) and to the issue of any deceased brother or sister by right of representation. In other words, under given circumstances, the Federal statutes cast descent on the parents equally while under the state law it is cast on brothers or sisters by right of representation. *The question at hand, therefore, is whether the courts of the state are properly applying the law in the descent of these Osage estates or are overlooking the directions of Congress in the matter.*

"In my opinion there is no conflict between this action of the state courts and the Federal statute, nor has the latter been overlooked nor ignored. The Federal statute deals with the estate of a deceased member of the tribe, and by the exception which gives rise to the question submitted in case of the contingency specified, operates upon such estate and passes it to the father and mother in equal shares. The state statute

which fixes the succession in the brothers and sisters of deceased unmarried minor *does not deal with the estate of such minor but concerns the original estate of the deceased ancestor. The estate which vests in the minor issue of such decedent is in its nature conditioned in that if such issue dies during minority and unmarried, the course of its devolution is continued from the ancestor and not commenced anew with the death of the unmarried infant. This is the condition upon which the infant receives the inheritance and the state statute which annexes the condition is not in conflict with the exception in the Federal statute.* This condition falls with the marriage or attainment of majority of the infant, and the estate inherited from the parent then passes in the ordinary course, in which case if the conditions are present which brings its devolution within the terms of the excepting clause of the Federal statute, it would be governed by them.

"Respectfully submitted,

E. O. Patterson, Solicitor."

Since that time the Interior Department has not questioned the correctness of the holding of the Oklahoma courts. In fact an investigation of departmental records would show that the department had been accepting as correct the holding of the Oklahoma courts long prior to 1928.

The case of *He-ah-to-me* v. *Hudson*, 121 Okl. 173, 249 Pac. 138, is an Osage Indian case in which the subdivision 7 was applied and that opinion has been accepted as a correct interpretation of the law ever since its rendition not only by the courts and the lawyers practicing in the Osage but by the Interior Department as well.

*He-ah-to-me* v. *Hudson* was overruled as to a point on collateral attack on a judgment, but not as to its interpretation of the inheritance statute. Even before the decision in *He-ah-to-me* v. *Hudson* the seventh subdivision was uni-

versally applied to estates of deceased Osages where applicable, and without question as to its efficacy.

The record in this case, pages 43 and 44, shows that the Secretary of the Interior followed subdivision 7 in determining the heirs of Arthur Rogers on June 15, 1911. Later, and, after the passage of the 1912 Act giving the courts instead of the Secretary jurisdiction to determine the heirs of the Osages, the Secretary vacated that determination and the case was submitted to the courts.

Respondent's counsel know of no decision of any court in Oklahoma which failed to follow the seventh subdivision of the code where it was applicable and where the facts were fully presented to the court.

The opinion of the Solicitor is supported by general authority.

In the case of *Perkins* v. *Simonds,* 28 Wis. 90, construing a similar statute, under quite similar facts, quoting from *Nash* v. *Cutler,* 16 Pick. (Mass.) 491, as follows:

> "The whole purpose is the descent of intestate estate, and we think the effect is that where, upon the descent of an estate to children, one of them shall happen to die in infancy, that is, at any time before arriving at the age at which, by law, he has the power of disposing of his estate, and before he has by marriage contracted obligations and established new connections which change his relative situation to others, his share of the inheritance, that is, his portion of the intestate estate, for the descent of which this statute is now providing, shall go just in the same manner as if such child had died in the lifetime of the ancestor, or, in other words, to those who would have taken the same share if such child had not existed. It directs that it shall go to the other children of the parent from whom it came, which it would have done had the child so dying not been in existence at the time of the decease of such parent. *It is rather giving a new destination to that portion of the parent's estate which has in some meas-*

*ure failed to accomplish the design of the Legislature by the premature death of such child, than to provide a new and distinct rule of distribution for such child's own estate."*

Holdings to the same effect were announced in *Sheffield* v. *Lovering,* 12 Mass. 505, and by the Supreme Court of New Hampshire in *McAfee* v. *Gilmore,* 4 N. H. 391; *Crowell* v. *Clough,* 3 Foster 207, and *Prescott* v. *Carr,* 9 Foster 453, and by the Supreme Court of Michigan in the case of *Ann Burke* v. *John D. Burke, et al.,* 34 Mich. 451.

## XIV.

### The Position of the Petitioner Is Not Supported by Reason or Logic.

It is reasonable for the surviving children of a deceased parent to have all of the estate except that liberal, definite portion which the law gives to the surviving spouse. We quote from *In the Matter of the Estate of Felicidad Carillo De Castro, Deceased,* v. *John Barry,* 18 Cal. 96, where the court was discussing subdivision 7:

"The meaning being clear, probably it is not very important to inquire into the considerations which moved the Legislature to make a different disposition of the property characterized in the seventh clause, and property otherwise coming to the intestate child. *Possibly the reason was that the Legislature considered the husband sufficiently provided for in being allowed an entire third part of the estate of the deceased wife, irrespective of the number of children over one; and that he should not have his portion increased by the circumstance of the death of one of the heirs. The act gave him a defined portion of the whole estate left at the death of the spouse, leaving the residue for the children; and as this portion was liberal, and was not diminished by the number of the children, it might well have been considered not unjust to him that that por-*

*tion should not be increased by the death of any one or more of them.* But upon whatever ground the policy of the act may be placed or defended, it is very clear to our minds that the court below gave the true construction of the provision."

It is not reasonable to assume that legislative bodies would incorporate subdivision 7 in the law of succession, if it had already been nullified by subdivision 2.

It is not reasonable that Congress would have intended to change a provision favorable to the surviving children of a deceased parent.

The exception in Section 6 of the Allotment Act cannot apply to the facts in this case for Woodrow Pryor's father, Antwine, is dead and the estate cannot go equally to the mother and father of Woodrow.

It is not Woodrow's estate which is being disposed of anyway but it is a recasting of his father's estate upon the death of Woodrow under age and not having been married.

## XV.

### The Authorities Cited by Petitioner Are Not in Point.

No precedent or analogy can be found in the four opinions of the United States Supreme Court cited by the petitioner under her heading II, pages 20 to 24 of her brief.

The first case cited is *Washington* v. *Miller,* 235 U. S. 422, 59 L. ed. 295. That case involved an inheritance from a deceased Creek Indian. His father was not of Creek Indian blood but of Seminole Indian blood. In both the original and supplemental agreements between the Creek Indians and the United States it was agreed that only citizens of the Creek Nation and their Creek descendants should inherit the lands of the Creek Nation. That provision was made an exception to the Arkansas laws which were made applicable to the Indian Territory, and specifically chapter 49 of Mansfield's Digest of the Laws of Arkansas.

The particular provision of the Supplemental Creek Agreement was as follows:

> "The provisions of the act of Congress approved March 1, 1901, (31 Stat. at L. 861, chap. 676) in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution on land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; Provided, that *only citizens of the Creek Nation, male and female, and their Creek descendants,* shall inherit lands of the Creek Nation; And Provided Further, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

In 1904 Congress passed an act adopting the Arkansas law generally for the Indian Territory. The Oklahoma Supreme Court held that the provisions of the Creek Agreement controlled over the provisions of the Arkansas law. That decision was upheld by the United States Supreme Court.

The syllabus in the *Washington* v. *Miller* case is as follows:

> "*1.* Lands which had been allotted to an enrolled Creek Indian who died intestate after receiving his allotment were still 'lands of the Creek Nation' within the meaning of Sec. 6 of the supplemental Creek agreement of June 30, 1902, (32 Stat. at L. 500, chap. 1323) which qualified the declaration that the descent and distribution of land and money provided for therein should be in accordance with the Arkansas statutes by providing that 'only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation,' and that, 'if there be no person of Creek citizenship to take the descent and distribu-

tion of said estate, then the inheritance shall go to non-citizen heirs in the order named' in the Arkansas statutes.

"*2.* The proviso in Sec. 6 of the supplemental Creek agreement of June 30, 1902, (32 Stat. at L. 500, chap. 1323) which qualify the declaration therein that the descent and distribution of land and money provided for by the act shall be in accordance with the Arkansas statutes, then in force in the Indian Territory, by providing that 'only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation,' and that 'if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named' in the Arkansas statutes were not impliedly repealed by a provision in the Act of April 28, 1904, (33 Stat. at L. 573, chap. 1824) that all laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise."

There is no such question involved in the case at bar. No one has contended or now contends that Congress does not have power to exercise control of the devolution of the estate of an Osage Indian, but it is only a question as to what Congress has actually done.

The case of *Marlin* v. *Lewallen,* 276 U. S. 58, 72 L. ed. 467, followed the opinion in the case of *Washington* v. *Miller* and held that the white father of a Creek allottee did not acquire the estate by curtesy under the Arkansas statute because the Creek agreement was controlling and provided that only citizens of the Creek Nation could inherit.

The case of *Grayson* v. *Harris,* 267 U. S. 352, 69 L. ed. 652, involved the same supplemental Creek agreement and the same chapter 49 of Mansfield's Digest of Arkansas laws,

and of course, resulted in the same holding that the agreement controlled and that only those heirs who were Creek citizens could inherit.

The case of *Campbell* v. *Wadsworth,* 248 U. S. 169, 63 L. ed. 192, involved a Seminole citizen who had died on July 4, 1901.

The agreement of October 7, 1899, between the United States and the Seminole tribe of Indians, ratified by Congress June 2, 1900, (31 Stat. L. 250, chap. 619) provided for the making of a roll of Seminole citizens, including all of those born up to December 31, 1899, and provided that such roll should be the final Seminole roll and provided further that allotted property should descend "to heirs who are Seminole citizens." This case held that the agreement was controlling and that the property so descended. The principal discussion in the opinion was whether or not the term "Seminole citizen" could be enlarged.

In the *Grayson* case, mentioned above, it was contended that the act applied only to the factual situations as they existed at the time of the passage of the act but the Supreme Court of the United States held it was a general act and that it looked to the future as well as to the present and applied to all Creek Indians.

The Osages now have a similar provision in section 7 of the Act of February 27, 1925, (43 Stat. L. 1008) which provides that none but heirs of Indian blood shall inherit from the Osages of one-half or more Indian blood. That provision has been challenged in the courts, and the Creek and Seminole provisions, and decisions concerning them, have been used as authority to sustain the Osage Act but no one has yet contended that the Osage Act applied only to the property or ownership situation, as it existed at the time of the passage of the act. If they should, then the *Grayson* case would be authority against such contention, but it is not authority as to any question now before this court.

It is desirable that it be understood that there is no question here between Indian and white heirs, or between Osages, and members of some other Indian tribe. Antwine Pryor, the father of the four children, was a full-blood Osage Indian, and his four children are all full-blood Osage Indians. The petitioner, the mother of three of those children, is a full-blood Osage Indian. Her three children were born after the close of the allotment rolls and have no property except that inherited from their father, Antwine. The question simply is whether the mother, who is an Osage allottee in her own right, gets the deceased child's share of the father's estate or whether it goes to the other children?

## XVI.

### The Decision in *United States* v. *Hale* Is Contrary to Petitioner's Major Contention.

It is claimed in petitioner's brief, pages 24 and 25, that the decision in the case of *United States* v. *Hale,* 51 F. (2d) 629, was in accordance with her contention, both as to the major and subordinate questions which she presents.

That claim is not correct. The *Hale* case was decided against her contention as to the major question and in favor of her contention as to the subordinate question. The case will be again noticed in this brief with reference to the subordinate question.

On the major question the court said (pages 630-631 of 51 F. (2d) ):

> "(1, 2) It is contended by appellant that Pearl Bigheart inherited the title to the one-half interest of Charles Bigheart in this land, by virtue of subdivision 7 of Section 11301, Comp. St. Okl. 1921, which provides as follows: (Quoting subdivision 7.)
>
> "The contention would be sound if that title had come to Pearl Bigheart by inheritance. *He-ah-to-me* v. *Hudson,* 121 Okl. 173, 249 P. 138."

If the court had decided that Section 6 made subdivision 7 inoperative, it would not have been necessary for the court to have decided at all the effect of the partition action in changing the title from one of inheritance to one of purchase.

What the court actually decided was that the descent of the property would have been governed by subdivision 7 except that it had lost its ancestral character by the partition proceeding.

The court did not, as indicated in petitioner's brief, first decide that the title had come by purchase instead of by inheritance but the court first decided that subdivision 7 was applicable, if the facts brought the subject of the litigation within that statute. Then it was decided that the title had come by purchase instead of by inheritance and hence was not within the statute.

So the opinion is exactly contrary to petitioner's major contention.

## XVII.

### The Oklahoma Supreme Court Decision Is Not Based Upon *Obiter Dicta*.

The petitioner suggests that the provisions of Section 6 of the Allotment Act may not have been called to the attention of the court in the case of *He-ah-to-me* v. *Hudson*, 121 Okl. 173, 249 Pac. 138.

In that case subdivision 7 was applied and that opinion has been accepted as a correct interpretation of the law ever since its rendition not only by the courts and the lawyers practicing in the Osage, but by the Interior Department as well.

*He-ah-to-me* v. *Hudson* was overruled as to a point on collateral attack on a judgment, but not as to its interpretation of the inheritance statute. Even before the decision in *He-ah-to-me* v. *Hudson* the seventh subdivision was uni-

versally applied to estates of deceased Osages where applicable, and without question as to its efficacy.

In *He-ah-to-me* v. *Hudson* this court, quoting from *De-Castro* v. *Barry,* 18 Cal. 97, said:

> "The clause in question provides for a specific and peculiar state of facts; therefore, there is no contradiction between it and the general provisions going before, for these last provide the usual rule, while the latter clause provides the unusual rule, or the rule governing the particular case recited."

It is not conceivable that either the Supreme Court of Oklahoma, which has passed on many Indian questions, or the able lawyers who represented Hudson, and who were practitioners among the Osage Indians, had no knowledge concerning the source from whence the authority of the Oklahoma courts to determine Indian heirs had come, or of the law applicable thereto.

Therefore for the petitioner to now contend that the question which she here raises was not before the court is to confess that that question was then so well settled and generally followed that it had become established and settled law.

## XVIII.

### The Decision of the Oklahoma Supreme Court Is Not in Conflict With Any Former Holding of That Court.

The case of *Mosier* v. *Jones,* 109 Okl. 228, 235 Pac. 199, involved only the original allotment of a minor and not inherited property.

There the only contention which was made was that the enabling act of Oklahoma had put in force the laws of descent of Oklahoma as applicable to the Indians and had in effect repealed that portion of Section 6 of the Osage Allotment Act which provided that where the decedent left no issue, nor husband nor wife, the property must go to the mother and father equally.

In that instance the mother and father were living apart and the mother sought to apply another provision of the Oklahoma statute which would have given her the whole of the estate because she had had custody of the decedent. The only contention she made to sustain that position was that the Oklahoma Enabling Act had amended, modified or repealed the exception contained in Section 6 of the Allotment Act. This court held that the Allotment Act was special legislation and controlled, and that estate descended to the mother and father *equally* as the act said it must.

## XIX.

**Congress has approved the construction by the Oklahoma courts of Section 6 of the Allotment Act and of the Oklahoma law of succession, including subdivision 7.**

By 1912 Oklahoma had amended its law of succession so that it conformed to the exception contained in Section 6 of the 1906 Allotment Act.

Then by the Osage Act of Congress of April 18, 1912 (37 Stat. L. 86), Congress had said:

> "*Sec. 3.* That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purposes to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the County Courts of the State of Oklahoma. * * *"

By the same act, Congress further said:

> "*Sec. 6.* That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma; * * *"

By the same act, Congress further said:

> "*Sec. 8.* That any adult member of the Osage tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma. * * *"

Congress then later passed the Osage Act of March 3, 1921 (41 Stat. L. 1249), and Act of February 27, 1925 (43 Stat. L. 1008), and March 2, 1929 (45 Stat. L. 1478), and the Act of June 24, 1938 (53 Stat. L. 1034). In none of these acts was there any change or modification of the law putting in force and effect the Oklahoma law of descent and distribution, including subdivision 7, showing clearly the purpose and intention of Congress to abide by the Oklahoma construction of the law of descent.

## XX.

### The Subordinate Question.

***Whether the title to real estate is held by purchase or by inheritance is a question of local law:***

It does not even involve a statute.

It does not involve a federal question.

The law concerning the question must apply alike to all citizens and property in Oklahoma.

The following is from the case of *Jackson* v. *Harris,* opinion by Mr. Justice PHILLIPS of the Tenth Circuit Court of Appeals, 43 F. (2d) 513:

> "1 syl. Laws of descent and distribution in force in state at time of death of Indian subsequent to admission of Oklahoma into Union controlled devolution of his estate.
>
> "3 syl. Congress making Oklahoma statutes control devolution of estates of Indians in Oklahoma did

not adopt Oklahoma statute as federal law, but merely provided that devolution should be in accordance with local law (Act June 16, 1906, c. 3335, Secs. 13, 21, 34 Stat. 267; Act May 27, 1908, c. 199, Sec. 9, 35 Stat. 312).

"4 syl. Construction of Oklahoma statutes of descent affecting estate of deceased Indian is solely question of local law (Comp. Stat. Okla. 1921, Secs. 11310 and 11301, subd. 3).

"7 syl. National courts will follow state court's interpretation of state statutes, where no question of general or commercial law or violation of Constitution or laws of United States is involved.

"8 syl. Construction by state court of statute of descent and distribution is binding on national courts.

"9 syl. Where decisions of state courts are conflicting, national courts will follow latest decision, except where rights are acquired under earlier decision.

"10 syl. Decision of state court construing statute of descent and distribution held binding on federal court as regards claimant of land by operation of law, not in possession nor relying on earlier decision.

(From opinion, pages 516 and 517:)

"(3,4) In providing that the devolution of the estates of deceased Indians in Oklahoma, after the admission of Oklahoma into the Union, should be controlled by the statute of descent and distribution of that state, Congress did not adopt the Oklahoma statute of descent and distribution as a federal law to control the devolution of estates of deceased Indians but rather provided that the devolution of such estates should be in accordance with the local law. It is, therefore, our conclusion that the construction of the Oklahoma statute is solely a question of local law. * * *

"(7) The national courts will follow the interpretation of a state statute made by the highest judicial

tribunal of the state, where no question of general or commercial law or violation of the Constitution or laws of the United States is involved. *Stutsman County* v. *Wallace,* 142 U. S. 293, 306, 12 S. Ct. 227, 35 L. ed. 1018; *Norton* v. *Shelby County,* 118 U. S. 425, 439, 6 S. Ct. 1121, 30 L. ed. 1178; *Hagar* v. *Reclamation Dist.,* 111 U. S. 701, 704, 4 S. Ct. 663, 28 L. ed. 569; *Illinois Cent. R. R. Co.* v. *Illinois,* 163 U. S. 142, 152, 16 S. Ct. 1096, 41 L. ed. 107; *Nielson* v. *Chicago, Bur. & Quincy R. R. Co.,* (C. C. A. 8) 187 F. 393, 396; *Yocum* v. *Parker,* (C. C. A. 8) 134 F. 205, 211; *McPherson* v. *Mississippi Valley T. Co.,* (C. C. A. 8) 122 F. 367, 373; *Scott* v. *McNeal,* 154 U. S. 34, 45, 14 S. Ct. 1108, 38 L. ed. 896.

"(8) The construction by the highest court of the state, of the statute of descent and distribution of such state, is binding upon the national courts. *Byers* v. *McAuley,* 149 U. S. 608, 621, 13 S. Ct. 906, 37 L. ed. 867; *Yocum* v. *Parker, supra; McPherson* v. *Mississippi V. T. Co., supra.*

"(9) Where such decisions are in conflict, the national courts will follow the latest settled adjudications of the highest court of the state rather than the earlier ones (*St. L. & S. F. Ry. Co.* v. *Quinette,* (C. C. A. 8) 215 F. 773, 775, 786; *Yocum* v. *Parker, supra; Bauserman* v. *Blunt,* 147 U. S. 647, 13 S. Ct. 466, 37 L. ed. 316; *Green* v. *Neal,* 31 U. S. (6 Pet.) 291, 297, 300, 8 L. ed. 402; *Lippincott* v. *Mitchell,* 94 U. S. 767, 24 L. ed. 315; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 201, 35 S. Ct. 57, 59 L. ed. 193), excepting in cases where contracts have been theretofore entered into or rights or titles acquired on the faith of the earlier decisions. *Moore-Mansfield Const. Co.* v. *Elec. I. Co., supra; Great Sou. Fireproof Hotel Co.* v. *Jones,* 193 U. S. 532, 452-546, 24 S. Ct. 576, 48 L. ed. 778; *Douglass* v. *Pike County, supra; Gelpecke* v. *Dubuque,* 1 Wall. 175, 17 L. ed. 520; *Thompson* v. *Lee County,* 3 Wall. 327, 331, 18 L. ed. 177; *Burgess* v. *Seligman,* 107 U. S. 20, 33, 2 S. Ct. 10,

27 L. ed. 359; *Fetzer* v. *Johnson,* (C. C. A.) 15 F. (2d) 145, 151, 25 C. J., p. 843, Sec. 179."

Also see *Erie Railroad Co.* v. *Thompkins,* 304 U. S. 64, 82 L. ed. 1188, and *United States of America* v. *State of Texas,* 314 U. S. 480, 86 L. ed. 356.

## XXI.

**The partitioning of the real estate left by Antwine Pryor between his heirs did not cause it to lose its ancestral character.**

The following is from *Re Moran,* 174 Okl. 507, 51 P. (2d) 277, 103 A. L. R. 227:

"1 syl. A partition suit does not change an estate otherwise ancestral to an estate of purchase; the mere division of property owned in common does not change the title from one of inheritance to a title by purchase."

(From opinion, page 229:)

"In the order for partition (C-m. 45-46), the court found and decreed that as to the 480 acres involved, Frank Edward Moran owned by inheritance from Edward Moran an undivided 1/3 interest therein, and, in addition, Frank Edward Moran owned an undivided 1/27 interest in said lands by inheritance from his mother. Frank Edward Moran then had an undivided 1/3 plus a 1/27 interest in said lands or a slightly greater interest than the Linch heirs. This was recognized by the commissioners in partition wherein they gave one farm to Frank Edward Moran, one farm to John Oscar Moran, and the other farm to the Linch heirs, and required Linch to pay each of the Morans $200 to even up their respective interest. (C-m. 51)

"The defendants contend that the payment of $200 by Linch to Frank Edward Moran constituted a purchase by Frank Edward Moran. With this we can't agree. Frank Edward Moran acquired nothing by pur-

chase, but, on the other hand, the Linches, through the partition action, acquired his 1/27 interest in the land inherited from his mother and left him 160 acres of land inherited from his father.

"Did the partition suit change the ancestral estate to an estate by purchase? We think not. The court in *Perry, et al.*, v. *Jones,* 48 Okl. 362, 150 P. 168, 169, recognized the rule by using this language: 'The general rule seems to be that a partition deed does not pass title, but merely adjusts the different rights of the parties to the possession. 21 Amer. & Eng. Ency. of Law (2d ed.), 1193; 30 Cyc. 166; *Wade* v. *Deray,* 50 Cal. 376; *Mickels* v. *Ellsesser,* 149 Ind. 415, 49 N. E. 3731; *Foster* v. *Hobson,* 131 Iowa 58, 107 N. W. 1101; *Richards* v. *Stewart,* 185 Mo. 533, 84 S. W. 1181; *Harrison* v. *Ray,* 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. Rep. 57; *Cottrell* v. *Griffiths,* 108 Tenn. 191, 65 S. W. 397, 57 L. R. A. 332, 91 Am. St. Rep. 748.'

"An excellent statement of the rule is found in 57 L. R. A. 339, as follows: 'A partition deed executed by tenants in common, holding by descent does not change the grantee's title from that of descent to one of purchase, so as to change the course of descent, and on the death of the grantee intestate such as his heirs as are not of the blood of his ancestor are excluded.'

"The Supreme Court of Kansas in the case of *Bennett* v. *Arrowsmith,* 101 Kan. 143, 165 P. 812, said, quoting from the body of the opinion:

> 'The result accomplished by partition has been described as follows: "Each of the allottees is deemed to hold the same title which he held before the partition, the undivided interest which he held in the whole tract being by the partition severed from the interests of his cotenants and concentrated in the parcel set apart to him." 30 Cyc. 166'."

The petitioner attempts to sustain her position as to the subordinate question by the opinion in the case of *United States* v. *Hale,* 51 F. (2d) 629.

The opinion in that case as to that point is not well founded. It is not supported by authority and it is contrary to the law as interpreted by the Oklahoma courts and by the courts generally in other jurisdictions.

The opinion as to this point approves the holding of Judge KENNAMER in the same case reported in 39 F. (2d) 188. Both opinions are based upon a decision of the Supreme Court of the United States in the case of *Robinson* v. *Fair,* 128 U. S. 53, 9 S. Ct. 30, 32 L. ed. 415, and the holding of the Supreme Court of Oklahoma in the case of *Lewis* v. *Gillard,* 90 Okl. 231, 173 Pac. 1136, neither of which supports the holding of the court in the *Hale* case.

In the case of *Robinson* v. *Fair* the question before the Supreme Court of the United States was whether or not the probate court of California had jurisdiction to partition real estate and in discussing that question the Supreme Court of the United States said (32 L. ed. 422):

> "We lay aside, as not open to dispute, the proposition that there is a difference between distribution and partition. And we are satisfied that the difference was in the mind of the Legislature when it passed the original Probate Act, as well as when the Code of Civil Procedure was adopted. As correctly observed by counsel, distribution neither gives a new title to property, nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession, and the extent of their respective interests; while partition, in most, if not in all, of its aspects, is an adversary proceeding, in which a remedial right to the transfer of property is asserted, and resulting in a decree which, either *ex proprio vigore* or as executed, accomplishes such transfer. But this difference is not sufficient, in itself, to solve the inquiry as to whether partition is

so far alien to the probate system, as recognized by the Constitution of California, that the power to make it could not be conferred upon probate courts; for, according to the doctrine of *Roxenberg* v. *Frank,* those tribunals may exercise whatever powers the legislature may, in its discretion, confer upon them, within the limits of such jurisdiction as usually pertains to probate courts."

There is not even an inference in that statement to the effect that inherited land lost its inherited or ancestral character by reason of partition among the heirs.

The Oklahoma case of *Lewis* v. *Gillard,* 70 Okl. 231, 173 Pac. 1136, presents a case involving Indian land which was restricted against alienation and the Supreme Court of this state held that partitioning of the lands would be an alienation and as Acts of Congress prohibited alienation of the land the court did not have jurisdiction to partition it.

There is not a sentence in either of the two cases on which the opinions in the *Hale* case rely for support, which in any way tends to support the conclusion in the *Hale* opinions, and while a few cases might be found which would support them, the general and better rule is to the contrary.

In 16 Am. Jur. 845 it is said:

"A partition among tenants in common of real property which they hold as ancestral estate—that is, where it came to them by descent, devise, or gift, from an ancestor—*does not affect the ancestral character of the tract taken by each. This is true whether the partition is made a legal proceeding or by deeds of mutual release.* The rule applies where one of the tenants in common is a person under legal disability."

We quote from the A. L. R. note to the case of *In re Moran,* 103 A. L. R., pages 231, 232, and 235:

"The rule adopted in the reported case (*Re Moran,* (Okla.) *ante* 227) that a partition suit (and de-

cree) does not change an estate otherwise ancestral to an estate of purchase, nor does the mere division of property owned in common change the title from one of inheritance to a title by purchase, finds support in most of the jurisdictions that have had occasion to consider the matter; and it has also been held that where amicable partition or deeds do not affect such a change; the courts ordinarily making no particular distinction between such deeds and partition decrees, so far as this question is concerned. * * *

"In holding that a fund which came to a minor from the sale, in partition proceedings, of land that descended from his grandfather, was to be distributed as realty upon the minor's later dying in infancy, the court in *Clepper* v. *Livergood,* (1836) 5 Watts 113, noted that there was no difficulty in tracing its source, and said that it did not in any particular partake of the character of a new acquisition. And, against the contention that the sale, following partition proceedings, of real estate of a deceased minor, which he had inherited, destroyed the ancestral character of the estate, and it was said in *Welles' Estate,* (1894) 161 Pa. 218, 28 A. 116, that *no matter through how many transmutations it may pass, so long as it can be identified it is still an 'ancestral estate.' The substance remains, although the form is changed;* the decision being made under the Connecticut law, inasmuch as the minor was domiciled in that state, although both the land and the proceeds of the sale were in Pennsylvania."

The court's attention is directed to the stipulation (R. 36, 37) wherein it is agreed that the $1,101.38, which was paid in from Woodrow's funds to equalize the value at the time division was made in the partition action, was paid from funds of said Woodrow Pryor as set over to him from his father's estate.

So the money is definitely identified as ancestral property and traced into this particular property. In Oklahoma

the distinction between real estate and personalty for the purpose of inheritance has been abolished.

### *Conclusion.*

May it be suggested that the courts of Oklahoma have recognized subdivision 7 as a part of the succession law of Oklahoma Territory and State for over 55 years and as a part of the succession law of the Osage Indians for over 35 years and since 1912; that during all of those 35 years the Department of the Interior has acquiesced in or actively approved the interpretation placed upon that law by the courts of Oklahoma. Every reported decision has recognized that subdivision 7 is applicable to the Osages. Real estate titles have been made by its application. Many sessions of Congress have been passed during the time the succession law was being so applied.

While it is true that this court has never passed upon the major question here raised both the state courts and the Circuit Court of Appeals have and those courts have affirmed generally the practice of the inferior courts, and have affirmed the beliefs and business methods of the public. The Interior Department has not only approved but has insisted upon the observance of that interpretation of the law.

There is presented here a brief quotation from 14 Am. Jur. 284, on *stare decisis,* which it is believed is applicable to the situation:

> "It finds its support in the sound principle that when courts have announced, for the guidance and government of individuals and the public, certain controlling principles of law or have given a construction to statutes upon which the individuals and the public have relied in making contracts, they ought not, after these principles have been promulgated and after these constructions have been published, to withdraw or overrule them, thereby disturbing contract rights that had

been entered into and property rights that had been acquired upon the faith and credit that the principle announced or the construction adopted in the opinion was the law of the land."

The rule should apply with equal force when the Department in 1928 announced the principle for its guidance and for the guidance of the Osages and the public.

Continuing to quote from 14 Am. Jur. 284:

"Sec. 61. *Necessity of Strict Adherence to Doctrine.* The doctrine of *stare decisis* is grounded on public policy and, as such, is entitled to great weight and must be adhered to, unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so."

Respectfully submitted,

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## *APPENDIX.*

### Oklahoma Succession Statute—84 O. S. 213.

"Sec. 213. *Descent and Distribution.* When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner:

"First. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation: Provided, that if the decedent shall have been married more than once, the spouse at the time of death shall inherit of the property not acquired during coverture with such spouse only an equal part with each of the living children of decedent, and the lawful issue of any deceased child by right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

"Second. If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or, if

he leave both father and mother, to them in equal shares; but if there be no father or mother, then said remaining one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares: Provided, that in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate shall go to the survivor, at whose death, if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation.

"Third. If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if the deceased, being the minor, leave no issue, the estate must go to the parents equally, if living together, if not living together, to the parent having had the care of said deceased minor.

"Fourth. If the decedent leave no issue nor husband, nor wife, nor father and no brother or sister is living at the time of his death, the estate goes to his mother to the exclusion of the issue, if any, of deceased brothers or sisters.

"Fifth. If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife.

"Sixth. If the decedent leave no issue, nor husband, nor wife, and no father or mother, or brother, or sister, the estate must go to the next of kin in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be

preferred to those claiming through an ancestor more remote.

"Seventh. If the decedent leave several children, or one child and the issue of one or more children, *and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.*

"Eighth. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise, they take according to the right of representation.

"Ninth. If the decedent leave no husband, wife, or kindred, the estate escheats to the state for the support of common schools.

"(R. L. 1910, Sec. 8418.)"

**Opinion of E. O. Patterson, Solicitor for the Interior Department, June 19, 1928, as to Application of Subdivision 7 of the Oklahoma Succession Code.** ***(Rec., p. 45)***

"United States Department of the Interior
Office of the Solicitor.

Washington, June 19, 1928. M-24293.

The Honorable, The Secretary of the Interior.

"Dear Mr. Secretary: At the suggestion of the Commissioner of Indian Affiairs you have requested my opinion on a question arising in connection with the determination of the heirs of Frances Pryor (An-to-op-py) deceased Osage allottee No. 570, the nature or extent of which ques-

tion will more readily appear after a brief review of some of the salient facts at hand.

"The tribal lands of the Osage Indians were allotted in severalty, pro rata, among the enrolled members of that tribe pursuant to the act of June 28, 1906 (34 Stat. 539), as a result of which each of the 2229 enrolled members received in allotment approximately 660 acres of land. Under the terms of that act underlying oil, gas, and other mineral deposits did not pass to the individual allotees but were reserved for the benefit of the tribe at large until April 8, 1931, subject to lease in the meantime by the tribal authorities under rules and regulations prescribed by the Secretary of the Interior. This communal period of ownership of the underlying mineral deposits has since been extended to April 7, 1946, by the Act of March 3, 1921, (41 Stat. 1249). Both of the statutes mentioned direct that the next proceeds (royalties, etc.) derived from these oil, gas, and other mineral deposits shall be distributed quarterly to the enrolled members of this tribe. Hence, each member receives exactly the same share of such royalties regardless of whether there had been any mineral development on the lands allotted to him or not. Owing to the large oil and gas deposits in the Osage country this right to participate in the royalties derived therefrom, commonly known as 'an Osage head right', has become a very valuable property right. Up to a year or so ago when the price of oil dropped considerably the income flowing to each enrolled member of the Osage tribe from this source alone ranged around $10,000 per year.

"As to the descent of such property, section 6 of the act of June 28, 1906, *supra,* provides:

> 'That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands,

moneys, and mineral interests must go to the mother and father equally.'

"Particular attention is directed to the concluding language of the foregoing, where the decedent leaves no issue, nor husband nor wife, the lands, moneys and mineral interests are to be divided between the mother and father equally.

"Frances Pryor, the allottee with whose estate we are here primarily concerned, died March 17, 1910, at the age of about 24 years, apparently in or shortly after child birth. She left surviving Antwine Pryor, husband; Julia Pryor, daughter; Susie Pryor, daughter; and an infant son 'Amos' who outlived his mother by about two days only. On May 1, 1911, this Department approved a recommendation from the Indian office wherein the heirs of Frances Pryor were stated as: Antwine Pryor, husband; Julia Pryor, daughter, and Susie Pryor, daughter. The share due each heir so found was not specifically set up but evidently this was understood to be a one-third interest each under the Compiled Laws of Oklahoma for 1909, Section 8985. Subsequently the attention of the Indian Office became directed to the fact that apparently the infant son Amos had outlived his mother and if so this would call for a somewhat different distribution of this estate. Thereupon additional information was obtained from the field, including affidavits from Antwine Pryor, the husband of Frances, and Rosa Red Eagle, the midwife attending the birth of Amos. These are to the effect that the infant son outlived his mother by about two days. Accordingly, under date of February 2, 1914, the Indian Office directed the superintendent of the Osage Agency to distribute this estate to Antwine Pryor, husband, 5/9ths; Julia Pryor, daughter, 2/9ths, and Susie Pryor, daughter, 2/9ths, evidently on the theory that at the death of Amos his 2/9th interest in his mother's estate under the law went to his father, Antwine.

"In the meantime, that is, between the finding of the heirs by this department in 1911 and the supplemental in-

structions issued by the Indian Office in 1914, the Act of April 18, 1912, (37 Stat. 86) came into existence. By it Congress directed, among other things (Section 3), that the property of deceased and incompetent members of the Osage tribe, in probate matters, should be subject to the jurisdiction of the County Courts of Oklahoma. This, of course, has rightly been construed as conferring jurisdiction to determine the heirs of deceased members of the Osage tribe on the courts of the state. On August 7, 1914, the County Court of Osage County entered its order in the matter of the estate of 'Amos Pryor, not allotted,' wherein it was found that Antwine Pryor, the father, was entitled to his entire estate. This, it will be observed, is in harmony with the construction placed on that situation by the Indian Office.

"Julia Pryor, Osage allottee No. 571, and one of the above named daughters of Frances Pryor, died March 20, 1921, at the age of about 14 years, unmarried and without issue. On May 3, 1923, the County Court of Osage County, Oklahoma, in the matter of her estate found and determined that her father, Antwine Pryor, was entitled to all of her original allotment as a member of the Osage tribe; all of certain interests inherited by Julia from one Tsa-pah-ke-ah, Osage allottee No. 485 (relationship not given) but as to the one-third interest in the lands, moneys, and mineral rights inherited by Julia from her mother, Frances Pryor, these were awarded to her sister, Susie, rather than to the father, Antwine.

"On February 16, 1927, the County Court of Osage County, Oklahoma, handed down a decree in the matter of the estate of Frances Pryor, deceased (who died in 1910) which decree reads in part:

"It is further ordered and found by the court that the heirs of the estate of Frances Pryor (An-to-op-py) allottee No. 570, deceased, are hereby found and declared to be: Antwine Pryor, husband, an undivided one-third interest; Edward Pryor, son, an undivided two-ninths' interest;

Susie Pryor West, daughter, an undivided two-ninths' interest; and that since the death of Frances Pryor( An-to-op-py) allottee No. 570, deceased; Julia Pryor, daughter, and Edward Pryor, son, have died, during their minority, and that Susie Pryor West, daughter is entitled to the interest inherited by said Julia Pryor and said Edward Pryor; making a total of two-ninths' interest that Susie Pryor West is entitled to in said estate of said Frances Pryor (An-to-op-py) allottee No. 570 deceased; and that Antwine Pryor, husband, and Susie Pryor West, daughter, are entitled to the entire estate belonging to Frances Pryor (An-to-op-py) allottee No. 570, deceased, in the following proportions, to-wit: Antwine Pryor, husband, an undivided one-third interest in said estate, and to Susie Pryor West, daughter, an undivided two-thirds' interest in said estate, and that the said Antwine Pryor and Susie Pryor West are the sole heirs of all the property, real and personal, belonging to the said Frances Pryor (An-to-op-py) allottee No. 570, deceased.'

"Whether the 'Edward' Pryor referred to in the foregoing is one and the same as 'Amos' Pryor, the deceased infant son of Frances Pryor hereinbefore referred to is not apparent. Assumably so, as elsewhere in the same decree it is recited that Edward died when about two weeks of age and that Julia Pryor died at the age of about 14 years. Lapse of time—1910 to 1927—may account for minor variations in this respect, which variations at best, are not vital to the issue now here. Of greater import is the fact that the County Court in the two decrees last mentioned awarded the interests inherited by Julia and Amos (Edward) from their deceased mother to the surviving sister, Susie, rather than to their father, Antwine Pryor. Doubtless such action by the County Court was pursuant to that provision of the Oklahoma code which reads:

> 'Seventh. If the decedent leave several or one child, and the issue of one or more children, and any such surviving child dies under age, and not having

been married, all the estate that came to the deceased child, by *inheritance* from such decedent, descends in equal shares to *the other children of the same parent*, and to the issue of any such other children who are dead, by right of representation.' (Italics supplied.)

"There has been no change in the foregoing statute of descent by the state Legislature during the periods of time with which we are here concerned, the same provision occurring in identical terms in the Compiled Laws of the state for 1909 as Section 8985, subdivision 7th; Revised Laws of 1910, Section 8419, subdivision 7th, and Compiled Statutes of 1921, Section 11301, subdivision 7th.

"It will also be observed that the latter findings by the court as to the interests inherited by Julia and Edward (Amos) Pryor from their mother, Frances, are not in harmony with the findings of the same court on August 7, 1914, in the matter of the estate of 'Amos Pryor not allotted,' wherein such inherited interests were awarded to the father, Antwine, rather than to the sister, Susie.

"This brings forward for immediate consideration the difference in devolution of estates as called for by section 6 of the Osage Allotment Act of June 28, 1906, and the seventh canon of the state code, both *supra,* it being again recalled that under the former if the decedent, adult or minor, leaves no issue nor husband nor wife, his Osage property must be divided equally between his mother and his father, while under the latter, if a minor, all of the estate that came to such minor by inheritance from either parent descends in equal shares to the surviving children of the same parent (brothers and sisters) and to the issue of any deceased brother or sister by right of representation. In other words, under given circumstances, the Federal statutes cast descent on the parents equally while under the state law it is cast on brothers or sisters by right of representation. *The question at hand, therefore, is whether the courts of the state are properly applying the law in the de-*

*scent of these Osage estates or are overlooking the directions of Congress in the matter.*

"In my opinion there is no conflict between this action of the state courts and the Federal statute, nor has the latter been overlooked nor ignored. The Federal statute deals with the estate of a deceased member of the tribe, and by the exception which gives rise to the question submitted in the case of the contingency specified, operates upon such estate and passes it to the father and mother in equal shares. The state statute which fixes the succession in the brothers and sisters of deceased unmarried minors *does not deal with the estate of such minor but concerns the original estate of the deceased ancestor. The estate which vests in the minor issue of such decedent is in its nature conditioned in that if such issue dies during minority and unmarried, the courts of its devolution is continued from the ancestor and not commenced anew with the death of the unmarried infant. This is the condition upon which the infant receives the inheritance and the state statute which annexes the condition is not in conflict with the exception in the Federal statute.* This condition falls with the marriage or attainment of majority of the infant, and the estate inherited from the parent then passes in the ordinary course, in which case if the conditions are present which bring its devolution within the terms of the excepting clause of the Federal statute, it would be governed by them.

Respectfully submitted,

E. O. Patterson, Solicitor."